

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF SOUTH DAKOTA

3 WESTERN DIVISION

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5 OTTO BISHOP; and STATE FARM, CIV 13-5062
6 MUTUAL AUTOMOBILE INSURANCE
7 COMPANY,

8 PLAINTIFFS, MAY 10, 11, 2016
9 VS. RAPID CITY, SOUTH DAKOTA

10 THE GOODYEAR TIRE AND
11 RUBBER COMPANY; and
12 GOODYEAR DUNLOP TIRE
13 NORTH AMERICA, LTD,

14 DEFENDANTS.

15 * * * * *

16 PARTIAL TRANSCRIPT OF PRETRIAL CONFERENCE

17 BEFORE THE HONORABLE JEFFREY L. VIKEN,
18 CHIEF UNITED STATES DISTRICT JUDGE

19 APPEARANCES:

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1 (The following in an excerpt from the pretrial
2 conference held May 10 and 11, 2016.)

3 THE COURT: The jurors really seem to prefer that
4 and I talked to them about it many times in civil cases and
5 it seems to make most sense to them.

6 We do have an objection by plaintiff, docket 121,
7 to Mr. Lawrence testifying as an expert witness in this
8 case and it's a question as to the scope of his testimony,
9 not whether or not he will testify, but as to the scope and
10 whether he's a 702 expert. Do you want to be heard on
11 that, Mr. Edwards?

12 MR. EDWARDS: Our position on it is pretty
13 straight-forward. Mr. Lawrence is an employee of Goodyear
14 and he regularly testifies on Goodyear's behalf. At this
15 point he's actually an employee of Goodyear Tire & Rubber
16 Company, and he is here as a corporate representative for
17 Goodyear Dunlop Tires North America. In any event, he's an
18 employee who regularly testifies on Goodyear's behalf.

19 The defendant identified him as non-retained
20 expert and did not provide a written report, but Rule
21 26(a)(2) says that if an employee is one whose duties is
22 the parties employ regularly involves giving expert
23 testimony, they need to provide a written report. With no
24 written report, I don't believe that Mr. Lawrence should be
25 offered an expert witness.

1 THE COURT: Mr. Bott.

2 MR. BOTT: Your Honor, I think very simply this
3 ultimately gets down to the issue of whether or not
4 Mr. Lawrence's job responsibilities at that time regularly
5 involved giving expert testimony. He's a member of what's
6 called the Product Analysis Group at Goodyear. They do
7 examine tires involved in litigation. That's a significant
8 part of what they do. They provide counsel to the legal
9 department and they primarily provide 30(b)(6) testimony
10 and state counterparts for 30(b)(6) testimony. And I
11 believe that I have the date right, that Mr. Lawrence was
12 disclosed as an expert in this case on or about October 1,
13 2014.

14 THE COURT: I saw that.

15 MR. BOTT: And at that time, well, yes, he had
16 testified as an expert on behalf of the company. His
17 expert testifying experience was limited, and most of his
18 deposition experience was in the context of being a
19 30(b)(6) witness. I was not involved in the case at that
20 time and Mr. Pugh and his firm were. And I know that if
21 need be, he can explain perhaps better than I as to what
22 was going on in the case at that time. But I do know
23 that -- you know, it's a subjective thing, I guess, as to
24 what is a regular part of someone's business practice,
25 again, taking it back to 2014 to give expert testimony.

1 And the disclosure identifies that Mr. Lawrence
2 would talk about his inspection of the tire, his results,
3 his conclusion on why this tire disabled. Mr. Edwards has
4 known since really the inception of the case that Goodyear
5 inspected the tire, that its engineers inspected the tire.
6 He knows that from other cases as well as this case. If
7 memory serves me correct, Mr. Edwards knew that Mr.
8 Lawrence has testified as an expert before. And in fact,
9 he's testified on these very issues before under
10 cross-examination by Mr. Lawrence because Mr. Edwards and I
11 had a case together in Washington State by the name of
12 Clutchee which is on this chart that he gave you. And in
13 the context of that case, Mr. Edwards had the opportunity
14 to fully cross-examine Mr. Lawrence on principles of
15 over-deflection and evidence on the tires and what it
16 means. Now, granted that's a different tire. But it's
17 interesting that Mr. Edwards did nothing to request either
18 a report or a deposition of Mr. Lawrence from October 1 of
19 2014 all the way up to the time of trial, despite the fact
20 that we clearly indicated to him that he was going to be
21 offering these expert opinions.

22 And so, number one, we think Mr. Lawrence should
23 be allowed to testify and we would certainly offer to
24 provide a report at this point. And also I would point out
25 that there's factors that go to -- that I think this

1 circuit in South Dakota recognizes in terms of evaluating
2 whether or not the appropriate remedy is to bar the witness
3 from testifying, even if you think a report should have
4 been provided. And under those factors, I have explained
5 to you, trying to explain the reason for the fact the
6 report was not given.

7 The surprise and prejudice to Mr. Edwards I think
8 is not a surprise because we had told him he was going to
9 be testifying as an expert; and little prejudice because he
10 knows these theories and chose to not ask for a report or
11 for a deposition.

12 And his testimony is very important to us because
13 he's an in-house engineering representative who has an
14 opportunity to speak to the jury on behalf of the company
15 as to what it found from inspection of this tire, not an
16 outside retained expert. And that is significant to us.

17 And also it won't really disrupt the trial
18 proceedings in any way, which is another factor that is
19 looked to, because he will be testifying as a corporate
20 representative even as part of Mr. Lawrence's case --
21 excuse me -- Mr. Edwards' case, and it's very similar to
22 what happened in the Clutchee case where he -- Mr. Edwards
23 did not call him as part of his case as an adverse witness,
24 so we put on Mr. Lawrence in our case. He testified as a
25 corporate representative and then we just went in to his

1 opinions on the tire analysis, and it really didn't
2 unnecessary delay or prolong or adversely impact the timing
3 of all of that.

4 So for all those reasons we would ask that the
5 Court not bar Mr. Lawrence and that he be allowed to
6 testify to his opinions regarding his inspection and
7 opinions regarding the failure.

8 THE COURT: Of course, it's not a question of
9 barring Mr. Lawrence; 30(b)(6) he can testify about the
10 corporation and how they operate and how these things are
11 manufactured. The question is when it comes down to this
12 cause of action and this tire.

13 MR. BOTT: Yes. I misspoke.

14 THE COURT: I am just trying to clarify for our
15 record how narrow the exclusion is. You know, Rule
16 26(a)(2) puts the burden on the party identifying an expert
17 witness or a witness who is an employee of Goodyear Dunlop
18 whose duties for the parties regularly involve giving
19 expert testimony. The burden to produce that written
20 report and all the detail that's required in the report is
21 on Goodyear Dunlop. It's not something that's handled some
22 other way.

23 Now, part of the reason that I have sometimes the
24 chagrin of plaintiff or defense counsel, it's limited the
25 scope of testimony of a 30(b)(6) witness not properly

1 disclosed under 26(a)(2), is that if I don't do that, there
2 is no Rule 26(a)(2), and people strategically find all
3 kinds of reasons to not produce a report.

4 I was in trial practice of personal injury,
5 wrongful death, product liability for 21 years. I know
6 what both sides do with the rules if they can find a judge
7 who will make an exception. It makes a difference here as
8 to whether we enforce them or not. So I will take a look
9 at it. Is there more argument on that subject?

10 MR. BOTT: No further argument, Your Honor. And
11 we have, again, as I mentioned in response to one of the
12 motions earlier, we have three short reply briefs on these
13 issues that we'd like to probably file with the Court, if
14 we would have leave. But the arguments are in essence what
15 I have vocalized.

16 THE COURT: Do you have a reply brief on this
17 point?

18 MR. BOTT: We have a reply brief on this, we have
19 a reply brief on the testing, which I mentioned to you,
20 which gets into the analysis of the case law. And we have
21 one on the other similar occurrence which, I mean, the
22 other one was other similar incidents. So those three.

23 THE COURT: Well, two of them we have taken care
24 of, haven't we?

25 MR. BOTT: We have.

1 THE COURT: This one I'd be happy to receive a
2 reply brief, if you would file it. Then it will be
3 electronically served on plaintiff's counsel. I would like
4 to take a look at this. I am not interested in acting in a
5 harsh way toward a particular party in any civil case, but
6 I am very interested in my responsibility to apply Rule
7 26(a)(2) and to avoid the innumerable perils that come from
8 finding exception to that rule, if there isn't good cause.
9 So I expect we'd have that this afternoon.

10 Well, let's start with that tomorrow. Let's take
11 it up and I will hear argument on it and I will consider it
12 more thoroughly this evening when I have your reply.

13 So we will break now. 10:30 tomorrow morning we
14 will reassemble.

15 I really am impressed by and grateful for the
16 work that counsel for plaintiff and defendant have put into
17 this case. It has its complexities and it's been very
18 thoroughly prepared. I appreciate that and I appreciate
19 your diligence working through the pretrial conference.
20 You've made good progress and we will finish up tomorrow.

21 So with that, you are off to your deposition and
22 we will see you tomorrow morning at 10:30.

23 (Court adjourned at 3 o'clock p.m.)

24 (Following proceedings in open court May 11,
25 2016.)

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1 THE COURT: We are resuming our pretrial
2 conference in the case of Bishop versus Goodyear Dunlop. I
3 believe we were to the point of the plaintiff's motion to
4 exclude expert testimony from the witness, Jay Lawrence.

5 Would you like to be heard on this, Mr. Edwards?

6 MR. EDWARDS: I don't know that I need to be
7 heard any more on it. I did file a motion for leave to
8 file a reply to their response; they filed their response
9 yesterday afternoon. I filed a motion for leave this
10 morning, for what it's worth, and I would point out that I
11 emphasize in the first part of that that Mr. Lawrence
12 actually is not an employee of Harley Goodyear Dunlop; he's
13 actually an employee of Goodyear Tire & Rubber Company.
14 And in his deposition I asked him were there times when he
15 worked for both Goodyear Tire & Rubber Company and Goodyear
16 Dunlop and his response is: I am employed by Goodyear Tire
17 & Rubber Company. The department I work in provides a
18 service to Goodyear Dunlop.

19 So at this point he's not even an employee of the
20 party, and so I don't believe the exception for an employee
21 would even apply. If it were to apply, in their response
22 the defendant points out that he has testified four times
23 as an expert. They don't disclose how many times he has
24 been designated as an expert without testimony. There's
25 still no identification of the cases where he was either

1 designated or where he testified. There's still plenty of
2 shortcomings from the information that would have been
3 provided in a proper report. That information still is not
4 available to us. And certainly there's not available to us
5 the kind of detail about specific opinions and specific
6 pieces of information on which he relies to come to those
7 opinions.

8 It's also suggested in the response that's filed
9 by Goodyear Dunlop the notion that he was identified as an
10 expert in a prior case, the Clutchee case in the State
11 Court of Washington; and I deposed him as an expert in that
12 case and he testified in that trial as an expert. But in
13 that case, it was a case involving a similar tire; it was a
14 case involving similar allegations by the plaintiff on the
15 defect theory; but in that case the defense was
16 dramatically different. In that case, Mr. Lawrence and the
17 retained outside expert in that case both agreed with
18 Mr. Woehrle on the mode of failure of the tire, not what
19 caused the failure of the tire, but the mode of failure.
20 That is getting down to less than 10 psi in the tire and
21 causing catastrophic failure due to substantial elevation
22 in temperature. They agreed with Mr. Woehrle in that
23 respect.

24 Their defense in that case was there was a piece
25 of road hazard that lodged in the tread. There was a

1 forensic examination afterward that showed a cut in the
2 tread all the way through into the air chamber. And
3 Goodyear's defense in that -- Goodyear Dunlop's defense in
4 that case was that they picked -- the tire picked up a road
5 hazard, a piece of metal on the road, that it lodged and
6 caused a slow leak that led to less than 10 psi in the
7 tire.

8 Here the defense is completely different than
9 that. They are saying there was -- this tire did not make
10 a 10 psi. They are saying that this was a long-term
11 development; that it was this tire being run at an
12 under-inflated condition, but not so low as 10 psi. And so
13 that the two cases were different in terms of defense and
14 the expert opinions that are coming in support of that
15 defense between the two cases, so the fact that Mr.
16 Lawrence -- I was exposed to Mr. Lawrence's opinions in our
17 case doesn't do anything with respect to the failure to
18 adequately disclose them in this case.

19 Finally, the last thing that I point out in the
20 reply that I filed is that this is not completely pulling
21 the rug out from underneath Goodyear Dunlop's ability to
22 present a defense in this case. They have a retained
23 expert, Mr. Follen, who can testify and give an expert
24 opinion.

25 With that, I think I have spoken my piece.

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1 THE COURT: Let me ask you, Mr. Edwards: at this
2 point, trial commencing 9:00 a.m. on Monday morning, are
3 you requesting that a proffer Rule 26(a)(2) report be
4 prepared in the event Mr. Lawrence is permitted to testify
5 on expert matters, that a proffer report be prepared and
6 disclosed to plaintiff?

7 MR. EDWARDS: If he's going to be allowed to
8 testify, I would request that. However, we are very short
9 in time before getting ready for trial. I've actually got
10 a fairly full schedule between now and Monday, and it puts
11 me in a significant disadvantage to receiving a written
12 report now as opposed to earlier.

13 THE COURT: Well, the element of surprise to the
14 plaintiff in the event Mr. Lawrence testifies as an expert,
15 we apparently don't know the full range of his opinions, at
16 least not as a signed report under 26(a)(2) and prejudice
17 to Mr. Bishop. I was interested to know whether the
18 production of such a report would at least give you
19 guidance on elements required in such a report and those
20 under 26(a)(2) would include a complete statement of all
21 opinions that Mr. Lawrence will express and the basis and
22 reasons for the opinions in the case.

23 Secondly, the facts and data considered by Mr.
24 Lawrence in forming the opinions.

25 Third, any exhibits that he intends to use to

1 summarize and support his opinions.

2 Fourth, his qualifications, including the list of
3 all publications offered in the previous ten years.

4 Fifth, a list of all other cases in which during
5 the previous four years the witness testified as an expert
6 at trial or by deposition.

7 And sixth, the statement of the compensation to
8 be paid for the study and testimony in the case.

9 So properly prepared 26(a)(2) reports signed by
10 an expert would include all those elements. If I line
11 those up with what's been disclosed in the initial
12 October 2014 identification as Mr. Lawrence as a potential
13 expert and where we are today in the case, there are some
14 differences between what a report would contain and what it
15 appears you have received so far. That's the purpose of my
16 question.

17 I have got to balance remedies here. If indeed
18 this rule applies, 26, and there's a potential sanction for
19 that, I have to weigh what possible remedies I have.

20 MR. EDWARDS: In terms of weighing the remedies,
21 the cases discussing the factors do say that it is -- that
22 the first step in the process is that proponent of the
23 expert show and has confirmed to show that the failure was
24 substantially justified or is harmless. And in this
25 instance, I don't believe Goodyear Dunlop has actually met

1 their burden of showing that it was substantially -- the
2 omission of the written report would substantially justify
3 the report as harmless.

4 You know, the fact that they tell the Court in a
5 pleading without an affidavit of anybody supporting that
6 Mr. Lawrence has testified as an expert four times in prior
7 cases without any effort to identify what those cases are,
8 to me demonstrates that Goodyear Dunlop is trying to avoid
9 putting Mr. Lawrence on the record getting him tied down
10 with written things. To me that's an indication that there
11 was a reason for not filing a written report in this case.
12 He's somebody with the company that is regularly involved
13 in the litigation, and now they are not -- they haven't
14 come forth with the information that should have been
15 provided. And secondly, if not provided, Rule 37(c), which
16 the courts rely upon in talking about the factors, says
17 that -- talks about unless the failure was substantially
18 justified as harmless. Then the Eighth Circuit as well as
19 the other circuits talk about factors, but they talk about
20 factors -- and there's case law to this effect -- that the
21 case law says these factors should be considered; it does
22 not say shall be considered. The Court still has the
23 automatic, the automatic sanction of excluding the expert
24 testimony available to it absent the showing that it's
25 required.

1 It is going to be harmful to the Bishop case, to
2 Mr. Bishop, and you know the fact is they simply did not
3 provide a written report. And if the remedy is, if the
4 remedy is, well, we will simply provide the opposing party
5 a written report five days before trial, then what's the
6 purpose of initial disclosure in the first place?

7 THE COURT: In other words, you wouldn't have an
8 opportunity to go out, secure a transcript of the
9 deposition previously given for trial, testimony previously
10 offered by the witness, or otherwise conduct the kind of
11 attorney work that would permit you to meet the testimony
12 or undermine -- challenge the credibility?

13 MR. EDWARDS: Correct.

14 THE COURT: The case is Wegener, W-e-g-e-n-e-r,
15 versus Johnson, 527 F.3d 687, Eighth Circuit 2008. That's
16 the case and numerous following cases in district courts
17 citing as a setup four factors to consider. In this
18 circuit, that's the case to which I think you were
19 referring. The four factors are pretty consistent across
20 the case law, generally. But, I mean, the factors are:
21 the reasons for noncompliance, the surprise and prejudice
22 to, in this case, Mr. Bishop's team, the extent to which
23 allowing the testimony would disrupt the order and
24 efficiency of the trial. That doesn't seem to be a major
25 factor. And importance of the testimony. So those are the

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1 factors the circuit identifies.

2 So there you are saying the only adequate remedy
3 at this juncture of the plaintiff is the exclusion of
4 Mr. Lawrence as an expert?

5 MR. EDWARDS: Yes. And it's not tantamount, it's
6 not the same as completely depriving the party of any
7 expert testimony. They still have their outside retained
8 expert, Mr. Follen.

9 THE COURT: Well, the cases that speak to extreme
10 remedy, the extreme nature of a remedy is to exclude any
11 possibility of presenting the evidence, not having an
12 opportunity to provide from some other source. Is that the
13 way you see it?

14 MR. EDWARDS: Yes.

15 THE COURT: Anything else on this point?

16 MR. EDWARDS: Nothing else, Your Honor.

17 THE COURT: Well, Mr. Bott, Mr. Pugh, your
18 position on this. Thank you for your filing.

19 MR. BOTT: Thank you, Your Honor. There's
20 probably not much to say in furtherance of yesterday. I do
21 want to respond a little bit to Mr. Edwards, and that is I
22 can assure you and the Court there was no intention to
23 withhold anything regarding the facts and background
24 experience of Mr. Lawrence.

25 My understanding is that the decision was made

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1 that he did not fall within the rule as someone who
2 required disclosure of a report because of the fact that at
3 that time in particular, it was evaluated and it was not a
4 regular form of his activities to testify as an expert as a
5 30(b)(6) witness.

6 Mr. Lawrence since then has testified more as an
7 expert and there is a case list that I believe Mr. Edwards'
8 office has on Mr. Lawrence, because their office does a lot
9 of tire litigation and they are familiar with Jay Lawrence
10 and I think they have this information.

11 So when we start talking about the prejudice to
12 the plaintiff, I would submit to you that the theories of
13 what we are talking about here in terms of over-deflection,
14 and how tires fail when subjected to over-deflection is a
15 science that Mr. Edwards' firm is well-acquainted with;
16 there are depositions of many, many experts.

17 And I would again point out while
18 their disclosure was made in October of 2014, Mr. Edwards
19 presumably understood at the time that no report was
20 provided. And rather than try to approach defense counsel
21 with the suggestion that, hey, I need a report or I am
22 going to move to strike this gentleman, he accepted that.
23 So if there's prejudice, he in part kind of did so at some
24 risk, perhaps, but, you know, I think the spirit of
25 cooperation in litigation is to try to approach counsel to

1 resolve those types of things and to not sit back and try
2 to use it as a sword at the time of trial. And here we've
3 had a year and a half to get this resolved. It's not as
4 though somebody would be doing this on the eve of the
5 trial.

6 So Mr. Lawrence is working on a report. He's out
7 of the hospital, Your Honor. Some of the information in
8 terms of the statement about four times as a witness
9 without an affidavit, it was necessitated, I think, because
10 of the timing of some of this. We didn't have time to get
11 affidavits and things. But nevertheless, we are working
12 on a report and we intend to provide that to the Court, you
13 know, either as part of what he would testify to or,
14 depending on the Court's ruling, as an offer of proof.

15 THE COURT: I think the four times of testifying
16 and giving deposition testimony was as of October of 2014,
17 wasn't it?

18 MR. BOTT: It was.

19 THE COURT: And so since October of 2014 have
20 there be depositions and testimonial appearances by
21 Mr. Lawrence?

22 MR. BOTT: There have.

23 THE COURT: Do you know how many?

24 MR. BOTT: I do not know that. He had been --
25 well, I forget whether it was the Clutchey trial, I

1 believe, was in November of 2014. And that was one
2 Mr. Edwards was involved in. How many times he testified
3 as an expert since then, I do not know.

4 But what had always -- by way of history, Your
5 Honor, the Goodyear Product Analysis Group, you know, from
6 my experience in representing them, which goes back to
7 about 2010, so what they would do is -- it is an
8 engineering group that would receive tires, inspect tires,
9 provide assistance to the legal department. Typically
10 those engineers did not testify as outside experts. It's
11 only been in recent years that that role has changed
12 somewhat. And so at the time this disclosure was made,
13 it's my understanding that Mr. Lawrence had testified four
14 times in either deposition or trial as an expert. But
15 since then, yes, he has testified some additional times,
16 but it wouldn't, I don't think -- I shouldn't say, because
17 I don't know how many, but he has been disclosed as an
18 expert and testified as an expert in other cases.

19 THE COURT: So all of his testimony both by
20 deposition or trial appearance would be in connection with
21 his employment by Goodyear Dunlop or some other corporate
22 entity connected to it?

23 MR. BOTT: Correct. And the whole employment
24 issue, he's an employee of the Goodyear Tire & Rubber
25 Company. And as I mentioned to the Court yesterday,

1 Goodyear was part of a joint venture in operation of
2 Goodyear Dunlop Tires North America. And it was in or
3 around that 2010 time frame that Mr. Lawrence became part
4 of, well, what is the product analysis person primarily
5 responsible with becoming familiar with the practices of
6 the Goodyear Dunlop tire facility and spent considerable
7 time at that facility. And Goodyear -- the Product
8 Analysis Group at Goodyear then assumed the role of
9 providing in that same time, consultation with the legal
10 department on Goodyear Dunlop cases that they had been
11 providing.

12 THE COURT: So was he providing services to
13 Goodyear Dunlop, as Mr. Edwards suggests, so really he's
14 just a -- he's not an employee, he's actually an expert,
15 then there would be no question.

16 MR. BOTT: He's not an employee of Goodyear
17 Dunlop. I think that all his compensation comes from the
18 Goodyear Tire & Rubber Company. So I do not think that he
19 would have performed services for Goodyear Dunlop and
20 received separate compensation for that. It would be all
21 part of his general job duties and responsibilities for the
22 Goodyear Tire Company program.

23 THE COURT: Let me just make sure I am clear.
24 Are you saying that during the critical time frames here
25 between this wreck and the October 2014 identification

1 without a Rule 26(a)(2) report, so that there's some shift
2 in his employment or his status that's had some effect on
3 this issue?

4 MR. BOTT: No. His legal employment has always
5 been with the Goodyear Tire & Rubber Company. And within
6 the Goodyear Tire & Rubber Company is a group called
7 Product Analysis, which is a group of five engineers. They
8 look at tires involved in claims as part of their
9 responsibility. Prior to the 2010 time frame, if there
10 were tires involved in litigation coming out of Goodyear
11 Dunlop, not Goodyear, but Goodyear Dunlop, that type of
12 analysis would have been provided by people at Goodyear
13 Dunlop in New York. And what I am trying to explain is
14 that it was in that 2010, '11, '12, '13, time frame that
15 those duties were being transitioned to the Product
16 Analysis Group at Goodyear, and specifically to Mr.
17 Lawrence, so that he was at the plant in Buffalo on
18 numerous occasions to learn all the details of the business
19 operations at Goodyear Dunlop so he would be in a position
20 to testify as a corporate representative and that's, as I
21 said, later, but led him to a change in company approach to
22 some of the litigation where we started using the in-house
23 people as engineers to testify as experts.

24 THE COURT: So if Mr. Lawrence testifies as the
25 corporate representative under the rule, but does not

1 testify about this particular tire failure or wreck, what's
2 the prejudice to Goodyear Dunlop? Because you have
3 Mr. Follen as an identified expert who speaks to all issues
4 of Mr. Woehrle, the plaintiff's expert speaks to.

5 MR. BOTT: We do. The only disadvantage there
6 would be in the sense that the jury would not be allowed to
7 hear from an engineer at Goodyear Dunlop that from the
8 company itself, I should say, on failure analysis of the
9 tire. It would simply be through the retained expert, Mr.
10 Follen.

11 THE COURT: Well, there's nothing in Rule
12 26(a)(2) that requires opposing counsel to make a request
13 for the report. There's nothing in 26(a)(2) that requires
14 someone to negotiate with counsel later an initial
15 disclosure; and part of it, even the change in the civil
16 rules, is all geared toward the efficient and inexpensive
17 resolution of litigation and the initial disclosure rules
18 are important in moving the case forward. 26(a)(2) is also
19 not dependent on who opposing counsel is and how familiar
20 they are with the case or theories in other cases or the
21 history and background of Mr. Lawrence. It's all on the
22 point that proper reports, all the elements identified
23 under the rule be produced so that counsel, as I am sure
24 you have done as an experienced attorney in cases, has an
25 opportunity in using your team to run all of that down and

1 prepared meet the proposed expert testimony as well as try
2 to undermine the credibility of the witness.

3 So I am concerned about this. The exclusion
4 would be an extreme remedy in terms of excluding Mr.
5 Lawrence's expert testimony if Goodyear Dunlop had no other
6 expert witness to meet the Woehrle expert testimony, but
7 that's not the situation. I don't think in terms of
8 looking at the factors that we have, as I said, a
9 particular problem with the disruption of the order of
10 efficiency of trial. Frankly, having tried plenty of
11 products liability cases and engaged in the discovery
12 procedures before they resolved, an expert getting on the
13 stand to express opinions without limitations placed on
14 that person by the initial disclosure report of 26(a)(2),
15 the opportunities for surprise and mischief are really
16 extreme. A person, in fairness, doesn't really know where
17 that expert is going to go. And part of the purpose of
18 26(a)(2) and the obligation to continuously update those
19 opinions as they develop is really critical to the
20 adversarial system so the jury gets the whole picture of
21 what that testimony is. And we don't have any boundaries
22 at this point on Mr. Lawrence's proposed expert testimony.
23 The result of that, of course, is prejudice. And the
24 importance of his testimony as an expert is, much of it, I
25 think from what I can tell, is a repeat of what the

1 retained expert, Follen, would say, so the jury would hear
2 twice instead of once, and that is not, I don't think,
3 highly prejudicial to Goodyear Dunlop. It has its expert
4 and the case is well-developed, as are the defenses through
5 what I have seen from defense so far in the case.

6 So the importance of Lawrence's testimony is not
7 such that weighing these factors so as to exclude his
8 testimony as an expert is any way an extreme remedy in this
9 particular case.

10 The other reality, and it has to be taken
11 seriously, is that these rules were not intended to be the
12 subject of strategic maneuvering and gamesmanship. I will
13 take you at your word that that's not what is happening in
14 this case. But if courts do not enforce the 26(a)(2) in
15 initial disclosures when it appears to me that from our
16 record that Mr. Lawrence is clearly covered by that, even
17 with four testimonial appearances, given what I understand
18 from everyone to be his other job duties, to not enforce
19 that rule is really to invite the kind of open strategic
20 warfare that used to take place in civil cases and for many
21 lawyers still as a major part of the reason we get up every
22 morning. It really is disruptive of the whole trial
23 process in reaching a just verdict.

24 So my balancing of these factors under the
25 applicable case law is that he's certainly a 30(b)(6)

1 witness for Goodyear Dunlop, but I am not going to permit
2 him to testify as an expert witness in the case as to any
3 matter connected with his record or any matter that would
4 be in the form of expert testimony. You have Mr. Follen
5 for that and that's my ruling.

6 Now, if you want to make a record, an offer of
7 proof, I would be happy to hear it; or if you want to put
8 it in at a later time for any appellate record, that's fine
9 with me as well.

10 MR. BOTT: I think probably at a later time, Your
11 Honor. That's fine. I understand the Court's ruling. I
12 anticipate maybe as we go into the trial, Mr. Lawrence
13 testifies, and in the interest of completeness when he does
14 take the stand, to try to get everything covered at one
15 point there might be issues that I would like to come back
16 to this with the Court to see if he would be permitted to
17 testify to certain subjects, just so that that is out
18 there. You can address that now or wait until it comes up.

19 THE COURT: Well, it makes sense as you suggest
20 to wait until it comes up. We will see what the testimony
21 landscape is at that point. And if you want to ask for
22 reconsideration of this ruling, then we will take it up and
23 I will hear from the parties.

24 MR. BOTT: I don't anticipate it would be
25 anything specifically related to this tire at all. I

1 wouldn't go there. It would be just maybe, perhaps,
2 general scientific principles.

3 THE COURT: Anything else on this point, Mr.
4 Bott?

5 MR. BOTT: No thank you, Your Honor.

6 THE COURT: Mr. Edwards.

7 MR. EDWARDS: Nothing else.

8 (End of partial transcript.)

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1 COURT REPORTER'S CERTIFICATE

2 STATE OF SOUTH DAKOTA)
3 COUNTY OF PENNINGTON) SS

4 I, Judith M. Thompson, R.P.R., Official Court Reporter in
5 and for the United States District Court, District of South
6 Dakota,

7 DO HEREBY CERTIFY that I acted as such Court Reporter at
8 the Hearing of the within-entitled action, and that the
9 foregoing partial transcript, pages 1 to 27, inclusive, is a
10 true and complete transcript of my shorthand notes taken at
11 said Hearing.

12 Dated at Rapid City, South Dakota, this 5th day of
13 September, 2016.

14
15
16 /s/

17 Judith M. Thompson, R.P.R.
18 Official Court Reporter
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